The New York Court of Appeals based that limitation on the statutory "linkage" in §§ 388(1) and (4) between a vehicle-owner's vicarious liability and that owner's obligation to maintain certain specified insurance coverage. In so ruling, the New York Court of Appeals stated:

> In addition to making the owner of a vehicle vicariously liable for the negligence of anyone driving it with permission, the statute requires that all vehicle owners procure insurance to cover the liability it creates [citation omitted]. This linkage of an owner's vicarious liability to an owner's obligation to maintain adequate insurance coverage suggests *that the Legislature's goal was to ensure that owners of vehicles that are subject to regulation in New York* "act responsibly" with regard to those vehicles.

Fried, 80 N.Y. at 41, 599 N.E.2d at 655, 587 N.Y.S.2d at 251 (emphasis added). *Accord Rogers v. U-Haul Co.*, 41 A.D.2d 834 App. Div. Second Depart. (1973) (Section 310 [predecessor section to Section 388(1)] should not apply "when the owner is not a New York resident" and "the automobile is not registered in New York and therefore not subject to our State's compulsory insurance provisions").

Applying *Fried*, the District Court found that "to avoid the serious constitutional questions that interpreting Section 388 to cover the facts of this case would raise," it must conclude that the New York legislature "did not intend for Section 388's reference to 'vehicles[s] used or operated' in New York to cover vehicles that are registered outside of New York and that were not being used or operated in New York at the time of an accident." Appendix D 49a. Since the

Nissan Xterra Powell had rented was not registered in New York and was not being operated in New York at the time of the accident, the District Court concluded that New York did not have an interest in applying § 388 to the accident.

Finding that Michigan also did not have an interest in applying its law to the accident, the District Court concluded that under Pennsylvania's choice-of-law principles, the law of the place of the accident, here Pennsylvania, should govern the determination of vicarious liability with respect to the accident. Since Pennsylvania does not impose vicarious liability on the owner of a vehicle under the circumstances of this case, the District Court granted summary judgment in favor of Budget on Chappell's vicarious liability claim against Budget.

On appeal, the Third Circuit reversed. The Appeals Court dismissed the District Court's interpretation of § 388 (as not applying to vehicles that are registered outside of New York and that were not being operated in New York at the time of an accident) as a "creative legal interpretation." Appendix A 12a. While citing *Fried*, and another pertinent New York Court of Appeals decision, *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S. 2d 248 (N.Y. 1967), the Third Circuit nevertheless concluded that New York did have an interest in applying § 388 to the accident in the present case because "by virtue of its prior use and operation in New York, the accident vehicle here is indisputably within § 388's substantive coverage." Appendix A 13a. In other words, notwithstanding contrary precedent from the New York Court of Appeals, the Third Circuit interpreted § 388 to mean that the mere fact that the Michigan-registered car had driven into New York on one isolated occasion was enough to apply

§ 388(1) to a non-resident owner under the "used or operated in this state" statutory language.

Unlike the District Court, the Third Circuit decision ignored the interpretation placed on § 388 by New York's highest court in *Fried*, which limited § 388(1) to vehicles that were registered in New York. The Third Circuit similarly misconstrued *Farber* by mistakenly highlighting as dispositive the fact that *Farber* involved a vehicle that had been driven in New York. To the contrary, however, the New York Court of Appeals in *Farber* relied on several additional facts as material and significant to its application of § 388. Specifically, the New York Court of Appeals applied § 388 in *Farber* because "[a]ll of the people involved" (including the vehicle owner) were "citizens and domiciliaries of New York; *the car was registered in New York*, arrangements for its use had been made in New York, and it was on its way back to New York when the accident occurred." *Farber*, 20 N.Y.2d at 203, 229 N.E.2d at 38, 282 N.Y.S.2d at 252 (emphasis added). Neither *Fried* nor *Farber*, thus, support the Third Circuit's interpretation of § 388.

Because the Third Circuit's ill-based decision improperly departs from this Court's precedent on the due process requirement for significant contacts governing the constitutionality of choice-of-law decisions, misconstrued § 388 in an arbitrary and fundamentally unfair way in direct contravention to the interpretation of that statute by the New York's highest court, and created a direct conflict with the United States Court of Appeals for the Fourth Circuit, petitioner seeks this Court's review.

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S CHOICE-OF-LAW DECISION CONTRAVENES THIS COURT'S PRECEDENT ON THE DUE PROCESS SIGNIFICANT CONTACTS REQUIREMENT AND CREATES DIRECT CONFLICTS WITH THE FOURTH CIRCUIT AND NEW YORK'S HIGHEST COURT

Embodying a carefully-conceived balance of individual and sovereign interests, this Court's precedent governing the constitutionality of choice-of-law decisions requires significant contacts between a jurisdiction, the parties, and an occurrence, such that application of that jurisdiction's law will be neither arbitrary nor fundamentally unfair. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 306, 101 S. Ct. 633. 638, 66 L. Ed. 2d 521, 528 (1981); *Phillips Petroleum Co. v. Shutts, et al.*, 472 U.S. 797, 822, 105 S. Ct. 2965, 2980, 86 L. Ed. 2d 628, 649 (1985). In the decision under review, however, the Third Circuit has improperly allowed casual and insubstantial, not significant, contacts to suffice as full compliance with the due process significant contacts requirement. The result is a direct split with the United State Court of Appeals for the Fourth Circuit, with New York's highest appellate court, and with relevant decisions of this Court, both in policy and result. Review and correction by this Court is, thus, essential.

The significant contacts requirement for choice-of-law decisions is not in dispute. This Court has stated that requirement as one in which:

> In deciding constitutional choice-of-law questions, whether under the Due Process Clause

> or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation. [citations omitted] In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, [citation omitted] the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction.

Allstate Ins. Co. v. Hague, 449 U.S. 302, 306, 101 S. Ct. 633, 638, 66 L. Ed. 2d 521, 528 (1981). In other words, contacts, if any, between the state whose law is to be applied and the parties and the occurrence may not be so slight or casual that it would be fundamentally unfair to a litigant to apply that law. Critical to the due process analysis is the reasonable expectation of the parties. *Phillips Petroleum Co. v. Shutts, et al.*, 472 U.S. 797, 822, 105 S. Ct. 2965, 2980, 86 L. Ed. 2d 628, 649 (1985).

Paying little more than lip-service to the constitutional standard, the Third Circuit failed to adequately address or apply due process requirements, and thereby substantially departed from relevant and controlling decisions of this Court. The Third Circuit improperly permitted the most casual and transitory of contacts to satisfy constitutional due process standards, specifically, Powell's use of Budget's car to drive to New York on one occasion. This was much too transitory and casual an act to provide New York an interest in this matter because it did not warrant the exercise of New York's legislative powers to regulate the car Powell was driving. Contrary to the New York Court of Appeals, the Third

Circuit's interpretation would extend § 388 to any non-resident owner of a vehicle when that vehicle had only the most casual, pass-through connection to New York.

The United States Court of Appeals for the Fourth Circuit, which addressed a virtually identical choice-of-law question in *Klippel v. U-Haul Co. of Northeastern Michigan*, 759 F.2d 1176 (4th Cir. 1985), unequivocally rejected the approach taken by the Third Circuit, as violative of due process requirements. In *Klippel*, the Fourth Circuit considered whether § 388 should apply to an accident in South Carolina, involving a Michigan-registered vehicle, rented from U-Haul in Florida, and occupied by both a driver and passenger from New York. The Fourth Circuit affirmed the district court's conclusion that New York did not have an interest in applying Section 388(1) to the accident (even though the vehicle-owner did business in New York), because the vehicle was neither registered in New York nor involved in an accident in New York. In so ruling, the Fourth Circuit stated:

> To the extent that [New York provides security for the protection of innocent victims] by creating statutory vicarious liability upon innocent owners and by requiring liability insurance covering the possible statutory liability, *it may do so only if the owner or the vehicle has such a connection with New York as to warrant New York's exercise of its legislative powers.* . . .
>
> The defendant, U-Haul, does business in New York, as it does in most, if not all, of the other contiguous forty-eight states, *but this vehicle was not registered in New York, and the lease was*

> *not executed there*. . . . New York has little interest in regulating the rights and liabilities arising out of the Florida lease.

759 F.2d at 1182 (emphasis added). A clear decisional conflict in the circuit courts, thus, now exists as a result of the Third Circuit's decision.

Equally, the Third Circuit's decision is in direct conflict with decisions from New York's highest court, both as to the scope and application of § 388 (*Fried*), and as to the facts that are significant and material to an application of § 388 in a choice-of-law dispute (*Farber*).

The Third Circuit's departure from governing New York law on § 388 misconstrued that statute in an arbitrary and unfair way, thereby, violating due process.[2] Moreover, in light of the New York Court of Appeals' own limitation of the scope of Section 388, to vehicles subject to New York's regulatory powers, Budget could not reasonably have expected that its liability with respect to a Pennsylvania accident involving its Michigan-registered and -leased car would be determined under New York law on vicarious

[2] On August 10, 2005, President George W. Bush signed the Transportation Equity Act. Section 30106(a) of said act eliminates vicarious liability for owners of motor vehicles that are rented or leased to another person or entity. This change in the law does not undermine the importance of the instant petition. New York's Vehicle and Traffic Law Section 388 still regulates vicarious liability for owners who are not engaged in the renting or leasing of vehicles. As such, the inconsistent precedents created by the Third Circuit as outlined above, as well as the due process implications, still have practical application and should by no means be deemed moot under this new law.

liability. Inevitably, the Third Circuit's decision will promote forum-shopping as a viable litigation strategy. Under the Third Circuit's decision, Budget is subject to unlimited vicarious liability, while under Fourth Circuit precedent and under decisions from the New York Court of Appeals, it is not. The conflict is clear and irreconcilable, warranting certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED MAY 5, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1931

BUDGET RENT-A-CAR SYSTEM, INC.

v.

NICOLE CHAPPELL; JOSEPH POWELL, III,

Nicole Chappell,

Appellant

February 15, 2005, Argued
May 5, 2005, Filed

OPINION OF THE COURT

AMBRO, Circuit Judge

We apply Pennsylvania's choice-of-law rules to determine which state's substantive law (New York's, Michigan's or Pennsylvania's) governs the extent of vicarious liability of Budget Rent-a-Car System, Inc. ("Budget"), the owner of a vehicle involved in an accident that rendered Nicole Chappell ("Chappell"), a New York resident, permanently paralyzed. The accident occurred in Pennsylvania as Chappell and her boyfriend, Joseph Powell, III ("Powell"), a Michigan resident, were driving from New York to Michigan in a car Powell had rented from Budget in Michigan (and previously driven to New York).

Appendix A

Because the State of New York has the greatest interest in the application of its law to this dispute, we conclude that its law should apply. The contrary judgment of the District Court is reversed.

I. Pertinent Facts and Procedural History

On the morning of February 12, 2002, Powell rented a Nissan Xterra from Budget in Michigan. Later that day, he drove eight hours to New York to visit Chappell. Powell stayed with Chappell in New York for the rest of that week. On the evening of February 15, after Chappell completed her work week, she and Powell left New York in the Xterra, planning to drive to Michigan to spend the weekend together there.

While driving through Pennsylvania early the next morning, Powell fell asleep at the wheel. The car drifted from the left lane of Interstate 80 across the right lane and into the right guardrail, causing it to flip over. Powell escaped the crash without substantial physical injury. However, the force of the impact ejected Chappell from the Xterra, causing severe injuries. Shortly after the accident, a helicopter transported her to Mercy Hospital in Pittsburgh, where doctors diagnosed, among other injuries, spinal trauma that has rendered Chappell permanently paraplegic.

Budget initiated this action in the United States District Court for the Eastern District of Pennsylvania, seeking a declaratory judgment against Powell and Chappell and asking the Court to determine which state's substantive law governed

its vicarious liability as the owner of the vehicle.[1] Budget argued that Michigan law should apply, capping its liability at $20,000. Chappell brought two counterclaims against Budget (vicarious liability and negligent entrustment) and a cross-claim against Powell. She argued that Budget faced unlimited vicarious liability under New York law.

The parties cross-moved for summary judgment on the choice-of-law issue, and the District Court granted summary judgment to Budget, holding that Pennsylvania law applied. Chappell moved for a certification of the issue and entry of a final judgment under Fed.R.Civ.P. 54(b). After the District Court granted that motion and entered a final judgment, Chappell timely appealed. We exercise appellate jurisdiction to review the District Court's final judgment under 28 U.S.C. § 1291.

II. Legal Framework

A. Pennsylvania Choice-of-Law

To determine which state's substantive law governs, we must refer to the choice-of-law rules of the jurisdiction in which the District Court sits, here Pennsylvania. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); *Melville v. American Home*

1. The District Court exercised diversity jurisdiction pursuant to 28 U.S.C. § 1332. As noted, Chappell is a New York resident and Powell is a Michigan resident. Budget Systems, Inc. was a Delaware corporation that maintained its principal place of business in Illinois. Subsequent to the accident, it was acquired by Budget, which was and remains a Delaware corporation with its principal place of business in New Jersey.

Assur. Co., 584 F.2d 1306, 1308 (3d Cir.1978). Under Pennsylvania law, we begin with an "interest analysis" of the policies of all interested states and then—based on the result of that analysis—characterize the case as a true conflict, false conflict, or unprovided-for case. *LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir.1996); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 187 & n. 15 (3d Cir.1991).

A true conflict exists "when the governmental interests of [multiple] jurisdictions would be impaired if their law were not applied." *Lacey*, 932 F.2d at 187 n. 15. If a case presents a true conflict, Pennsylvania choice-of-law rules "call for the application of the law of the state having the most significant contacts or relationships with the particular issue." *In re Estate of Agostini*, 311 Pa.Super. 233, 457 A.2d 861, 871 (1983). As explained in the Second Restatement of Conflict of Laws,

> the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971).

"A false conflict exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law." *Lacey, 932 F.2d at 187.* If there is a false conflict, we must apply the law of the only interested jurisdiction. *See, e.g., Kuchinic v. McCrory*, 422 Pa. 620, 222 A.2d 897, 899-900 (1966); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796, 807 (1964).

Finally, an unprovided-for case arises when no jurisdiction's interests would be impaired if its laws were not applied. *Lex loci delicti* (the law of the place of the wrong—here Pennsylvania) continues to govern unprovided-for cases. *See, e.g., Miller v. Gay*, 323 Pa.Super. 466, 470 A.2d 1353, 1355-56 (1983).

With this background, we turn to the competing state laws we consider applying.

B. Relevant State Law Provisions on Vicarious Liability

1. New York

New York law imposes unlimited vicarious liability on the owners of vehicles. It provides that "[e]very owner of a vehicle used or operated in [that] state shall be liable and responsible for . . . injuries to person[s] . . . resulting from negligence in the use or operation of such vehicle. . . ." N.Y. Veh. & Traf. Law § 388(1) (McKinney 2002). By passing *§ 388(1)*, the New York "[l]egislature intended that the injured party be afforded a financially responsible insured person against whom to recover for injuries." *Plath v. Justus*, 28 N.Y.2d 16, 319 N.Y.S.2d 433, 268 N.E.2d 117, 119 (1971).

It is beyond dispute that § 388(1) has extraterritorial scope, that is, it can apply to accidents occurring beyond New York's borders. *Farber v. Smolack*, 20 N.Y.2d 198, 282 N.Y.S.2d 248, 229 N.E.2d 36, 40 (1967) (holding that "[t]o the extent . . . earlier decisions declined to give extraterritorial effect to [§ 388], they are overruled"). This dispute requires us to assess the *extent* of the extraterritorial scope of § 388(1). The New York Court of Appeals has held that "vicarious liability imposed by section 388(1) does not extend to owners of *vehicles that have never been registered, used, operated or intended for use within [New York].*" *Fried v. Seippel*, 80 N.Y.2d 32, 587 N.Y.S.2d 247, 599 N.E.2d 651, 654 (1992) (emphasis added). We later address whether (under New York law) the Xterra in our case falls within that exclusion.

2. Michigan

Michigan also imposes vicarious liability on the owners of vehicles. Its law provides that "[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle . . . [if] the motor vehicle is being driven with his or her express or implied consent or knowledge." Mich. Comp. Laws § 257.401(1) (2003) ("Subsection 1"). Liability is capped, however, in certain circumstances: "[The liability of] a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle under a lease providing for the use of the motor vehicle by the lessee for a period of 30 days or less . . . is limited to $20,000.00 because of bodily injury to or death of 1 person in any 1 accident. . . ." Mich. Comp. Laws § 257.401(3) (2003) ("Subsection 3"). In effect, vicarious liability is imposed on an owner when the driver's negligence

causes an accident in another state so long as the owner-driver relationship was entered into in Michigan. *Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843, 856 (1982).

At the time of Chappell's accident, Michigan law provided that it was a misdemeanor for "an owner knowingly [to] permit to be operated, upon any highway, a vehicle required to be registered . . . unless there is attached to and displayed on the vehicle . . . a valid registration plate issued for the vehicle. . . ." Mich. Comp. Laws §§ 257.255(1), (2) (2001).[2]

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2. The parties presented (and the District Court relied on) several legal arguments implicating the significance of this provision, all involving events that took place before Powell rented the vehicle. For reasons explained below, we need not reach these arguments. For the sake of completeness, however, we set out the pertinent pre-rental facts.

Assuming that Budget followed its regular procedures, after the Xterra arrived in Romulus, Michigan (on or about January 30, 2002), a Budget fleet clerk obtained Michigan license plate NVQ532 and placed that plate on one of the Xterra's seats. A "lot person" later removed the plate from the Xterra's seat and affixed it to the vehicle.

After placing the plate in the Xterra, the fleet clerk wrote license plate number "NVQ532" at the top of the vehicle's certificate of origin and took the certificate to the office of Michigan's Secretary of State. Someone unknown crossed out the fleet clerk's initial reference to "NVQ532" and wrote "PHS756" next to it.

Michigan license plate NVQ532 was registered for use with a 2001 Ford with Vehicle Identification Number 1FAFP55201G235610

(Cont'd)

3. Pennsylvania

Pennsylvania follows the common law rule that, absent an employer-employee relationship, an automobile's owner is not vicariously liable for the negligence of its driver. *Solomon v. Commonwealth Trust Co.*, 256 Pa. 55, 100 A. 534, 535 (1917); *Shuman Estate v. Weber*, 276 Pa.Super. 209, 419 A.2d 169, 172 (1980).

III. Analysis

A. District Court Opinion

The District Court's opinion is a plot-twister. The case starts simply enough: "the parties [sought] a declaratory judgment . . . whether the law of *New York* or *Michigan* governs the extent of Budget's vicarious liability to Chappell. . . ." *Budget Rent-A-Car System, Inc. v. Chappell*, 304 F.Supp.2d 639, 644 (E.D.Pa.2004) (emphases added). "[M]indful" of what it described as "[a] delicious irony in

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(Cont'd)

that Team Fleet Financial Corporation ("Team Fleet") owned. Team Fleet leased its vehicles to Budget. Budget's fleet clerk had access to a plate registered to a vehicle that Team Fleet owned.

An employee at the Secretary of State's office used the certificate of origin, including the handwritten annotation for the license plate, to register the Xterra and to create an Application for Michigan Vehicle Title for it. The Michigan Secretary of State's office registered the Xterra with Michigan license plate PHS756 and prepared a title application for the transfer of Michigan license plate PHS756 to the Xterra.

how the parties briefed this case," *id.* at 650 n. 17, the District Court "concluded that *Pennsylvania* law controls the resolution of the issues," *id.* at 651 (emphasis added).

This conclusion unfolds as follows. The Court assessed New York and Michigan's respective vicarious liability provisions, reaching the following two intermediate determinations. First, it "predict[ed] that the New York Court of Appeals" would "avoid the serious [federal] constitutional questions" it perceived in § 388(1) by concluding that the statute's "reference to 'vehicle[s] used or operated' in New York [does not] cover vehicles that are registered outside of New York and that were not being used or operated in New York at the time of an accident," *id.* at 647-48. Second, it decided that Budget could not invoke Michigan's limitation of liability for short-term lessors of cars in Subsection 3 because "the lease between Budget Systems and Powell was 'founded on' a misdemeanor—Budget Systems's grant of permission to operate the Xterra without a valid license plate—" and is therefore a "nullity" under Michigan law, *id.* at 650.

Having determined that neither New York's nor Michigan's substantive legal provisions would apply in this case, the District Court reasoned that neither state had an interest in applying its law. *Id.* at 650-51. That is, the Court characterized this dispute as an unprovided-for case. *Id.* at 651. As a result, it held that the rule of *lex loci delicti* governed, Pennsylvania's substantive law applied, and thus Budget did not face vicarious liability. *Id.*

In sum, the District Court's choice-of-law ruling rested on its limiting interpretations of New York and Michigan substantive law. Before turning to the choice-of-law inquiry, we address the propriety of those legal interpretations.

B. Does New York's § 388(1) Apply to This Dispute?

The District Court predicted that the State of New York would not construe § 388(1) to apply to this case. Our review of this prediction is plenary. *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir.2000). We disagree with the District Court's analysis and conclude that this case falls within the scope of § 388(1) as that statute has been construed by New York's courts.

Our core query is what does the phrase "used or operated in [New York]" in § 388(1) mean? Fortunately, New York's Court of Appeals has addressed this question on several occasions.

In *Farber v. Smolack*, the Court of Appeals implied that § 388(1) has as broad a scope of *substantive* application as would be consistent with New York's *choice-of-law* principles.[3] When

3. *Farber* involved the following facts and disposition. Robert Smolack loaned his automobile to his brother, Arthur, so that Arthur could drive his family to Florida and back. While in North Carolina, Arthur's negligence caused an accident in which his wife was killed and his two sons were seriously injured. Representatives of the wife's estate and of the children sued Robert under § 388(1), but the trial court dismissed the claim, holding that the provision did not apply. The Court of Appeals reversed, stressing that "[all parties] were citizens and domiciliaries of New York; the car was registered in New York; arrangements for its use had been made in New York; and it was on its way back to New York when the accident occurred." *Id.* at 38.

"New York is . . . the jurisdiction having 'the most significant relationship' with the issue presented," § 388(1) applies. *Farber*, 282 N.Y.S.2d 248, 229 N.E.2d at 40 (citations omitted). While this formulation is unfortunate inasmuch as it conflates—or at least equates—the substantive law question (the scope of the statute) with the choice-of-law issue (the extent of New York's interest in applying the statute),[4] this early precedent nonetheless sets the principle that New York will broadly apply § 388(1), perhaps as broadly as is permissible under constitutional choice-of-law principles.

Eight years later, in *Sentry Ins. Co. v. Amsel*, 36 N.Y.2d 291, 367 N.Y.S.2d 480, 327 N.E.2d 635 (1975), the New York Court of Appeals again stressed the broad scope of the statute, explaining that "[t]he legislative history of [§ 388(1)] indicates that the Legislature intended to enlarge the vehicle owner's vicarious liability and not to draw the line at the border." *Id.* at 637.

Most recently, in *Fried v. Seippel*, the Court of Appeals directly addressed the scope of the statute and held that the "vicarious liability imposed by section 388(1) does not extend to owners of vehicles that have *never been registered, used, operated or intended for use within [New York].*" 587 N.Y.S.2d 247, 599 N.E.2d at 654 (emphasis added). In

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4. The District Court in our case recognized the important distinction between these questions, explaining that when it "focus[ed] first on the issue of whether Section 388 covers these facts," it "[would] not address the myriad cases that have considered the applicability of that statute based on choice-of-law principles." *Budget*, 304 F.Supp.2d at 646 n. 12.

Fried, Avis (which operated in New York) owned a Jamaican car rental company that rented a vehicle of Jamaican registry to Seippel, a New York resident. Seippel and Fried (also a New York resident) were in the car in Jamaica when one of them[5] negligently caused a head-on collision. Fried died in the accident. His representatives sued Avis under § 388(1), and the trial court denied Avis's motion for summary judgment based on the Jamaican company's ownership of the vehicle. Putting aside the issue whether Avis should be deemed the vehicle's owner, the Court of Appeals held that § 388(1) did not apply because the car "ha[d] never been registered, used, operated or intended for use within [New York]." *Fried*, 587 N.Y.S.2d 247, 599 N.E.2d at 654.

1. Scope of the Statute

Noting that "[t]he facts here fall in the middle ground between *Farber* and *Fried* because the Xterra was not registered in New York but Powell did drive it there," the District Court interpreted these cases to mean that "New York courts would conclude that the New York legislature did not intend . . . to cover vehicles that are registered outside of New York and that were not being used or operated in New York at the time of an accident." *Budget*, 304 F.Supp.2d at 647-48. We disagree with this creative legal interpretation.

The *Fried* Court stated that "the holding in *Farber* ha[d] little bearing on the statutory construction problem presented [in *Fried*], since, *by virtue of its prior 'use . . . or operat[ion] in [New York],' the accident vehicle in Farber was*

5. The Court concluded that it was unclear whether Fried or Seippel was driving. *Fried*, 587 N.Y.S.2d 247, 599 N.E.2d at 652.

indisputably within section 388's substantive coverage. . . ." *Fried*, 587 N.Y.S.2d 247, 599 N.E.2d at 654 (emphasis added). This statement by New York's highest Court is irreconcilable with the District Court's view and is arguably sufficient of itself to settle the statutory construction issue before us. As in *Farber*, by virtue of its prior use and operation in New York, the accident vehicle here is indisputably within § 388's substantive coverage.

Yet we need not labor, as the District Court did, to discern the scope of New York's law from the disposition of its precedents, for the *Fried* Court explicitly drew a line for us: "vicarious liability imposed by section 388(1) does not extend to owners of vehicles that have *never been registered, used, operated or intended for use within this State.*" *Fried*, 587 N.Y.S.2d 247, 599 N.E.2d at 654 (emphasis added). The vehicle in this case was used, operated *and* intended for use within New York.

Lest we be left with doubt as to the meaning of the seemingly clear rule announced in *Fried*, we refer to New York's intermediate courts for further guidance. "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 85 L.Ed. 139 (1940). In *Vasquez v. Christian Herald Ass'n*, 186 A.D.2d 467, 588 N.Y.S.2d 291, 292 (N.Y.App.Div.1992), only five months after *Fried*, the First Department of the Appellate Division of New York's

Supreme Court cited *Fried* as authority for the applicability of § 388(1) to facts similar to this case.[6] Leave to appeal the intermediate appellate court's decision in *Vasquez* was denied by the Court of Appeals.[7]

In short, the District Court's conclusion that § 388(1) does not "cover vehicles that are registered outside of New York and that were not being used or operated in New York at the time of an accident," *Budget*, 304 F.Supp.2d at 648, runs afoul of New York's precedent. To the contrary, the provision applies unless the accident vehicle "ha[s] *never*

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6. In *Vasquez* one plaintiff was a New York resident (the other an Ohio resident), the owner of the vehicle was a Pennsylvania resident (a co-defendant was a New York resident), and the accident took place in Pennsylvania. The Court explained that the "[d]efendant . . . erroneously relie[d] upon . . . *Fried* . . . [because] [an agent of the *New York* defendant (not the owner)] had operated the subject van to and from New York with [the New York defendant]'s permission." *Id.* The use of the car in New York was enough to extend liability under New York law to the Pennsylvania *owner* of the vehicle notwithstanding that the accident took place in Pennsylvania.

We also note that the United States District Court for the Eastern District of New York has decided, albeit in a not precedential opinion we cite solely as persuasive authority, that § 388(1) applied to an out-of-state accident involving a car not registered in New York on the basis of prior use and operation of the vehicle in the State. *Roberts v. Xtra Lease, Inc.*, No. 98 CV 7559, 2001 WL 984872, at *7 (E.D.N.Y. June 25, 2001).

7. When a state's highest court denies review, the policy reasons for following an intermediate court decision (absent compelling evidence to the contrary) are strengthened. *See, e.g., Comer v. Texaco, Inc.*, 514 F.2d 1243, 1244 (5th Cir.1975).

been registered, used, operated or intended for use within [New York]." *Fried*, 587 N.Y.S.2d 247, 599 N.E.2d at 654 (emphasis added). Thus, the provision applies to our case.

2. Constitutional Concerns

The District Court's construction of § 388(1) was premised on its perception that applying the statute in this case would implicate federal constitutional problems. It predicted that the New York courts would adopt its specific limiting construction of the statute in order "[t]o avoid the serious constitutional questions that interpreting Section 388 to cover the facts of this case would raise. . . ." *Budget*, 304 F.Supp.2d at 648. That is, the District Court interpreted New York law to require that a court invoke the doctrine of constitutional avoidance in order to sidestep potential constitutional problems raised by the application of the statute in this case. It further predicted that the New York courts would adopt a limiting construction imposing its bright-line registration requirement. We have already disagreed with the District Court's construction of the statute. We now address the constitutional concerns it perceived.

To be technical, the Court did not actually hold that application of § 388(1) would be unconstitutional. It simply predicted that the courts of New York "would recognize that the United States Supreme Court has held that due process forbids states from regulating extraterritorial activities with which they have 'slight' or 'casual' connection" and avoid the issue altogether by narrowing the statutory scope. *Id.* at 647-48 (citing *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178

(1934); *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930)). Having parted from the District Court's statutory interpretation, we ask simply whether application of the statute in this case under the *Fried* rule would violate the Constitution (as opposed to asking whether New York courts would perceive the application of the statute in this case as a potential constitutional problem they should avoid by adopting the District Court's construction).

The Supreme Court has spoken on this issue since 1934, when the most recent case cited by the District Court was decided. In fact, the precedent that gave rise to the District Court's constitutional apprehensions is widely recognized to be irrelevant under modern law. As Chappell points out, *Delta* and *Dick* were decided before the modern states' interest framework for choice-of-law analysis began to dominate. The plurality opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981), for example, noted that *Delta* has "scant relevance for today" because "[i]t implied a choice-of-law analysis which, for all intents and purposes, gave an isolated event . . . controlling constitutional significance, even though *there might have been contacts with another State . . . which would make application of its law neither unfair nor unexpected.*" *Id.* at 309 n. 11, 101 S.Ct. 633 (emphasis added). *See also Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed.2d 229 (1964); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 75 S.Ct. 166, 99 L.Ed. 74 (1954).

In *Hague* the Supreme Court stated that in order for the substantive law of a state "to be selected in a constitutionally permissible manner, the state must have a significant contact

or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-13, 101 S.Ct. 633. In that case, a Wisconsin resident who had three automobile insurance policies was killed in an accident in Wisconsin by an uninsured motorist. Suit was filed in Minnesota by the decedent's personal representative to recover under the uninsured motorist endorsements of the three policies. Minnesota permitted the stacking of policies, while Wisconsin did not. The Supreme Court affirmed the application of Minnesota law on the basis of three contacts that it found, in aggregate, constitutionally sufficient:

> First, . . . Mr. Hague was a member of Minnesota's work force, having been employed by a Red Wing, Minn., enterprise for the 15 years preceding his death. . . . Mr. Hague's residence in Wisconsin does not . . . constitutionally mandate application of Wisconsin law to the exclusion of forum law.... Second, Allstate was at all times present and doing business in Minnesota. By virtue of its presence, Allstate can hardly claim unfamiliarity with the laws of the host jurisdiction and surprise that the state courts might apply forum law to litigation in which the company is involved.... Third, respondent became a Minnesota resident prior to institution of this litigation.

Id. at 313-18, 101 S.Ct. 633. We have no doubt that this case passes the *Hague* standard for a constitutionally permissible choice of law. All three of the factors the Court relied on in *Hague* are present here, plus many more. As a result, we see

no constitutional problem with the choice of New York's substantive law to govern this dispute.

We note an additional problem we perceive with the District Court's analysis. The Court viewed *Hague 's* forbears as a limitation on the permissible interpretation of the scope of New York's *substantive* law. Yet, as best illustrated by *Hague*, the relevant issue is the constitutionality of a *choice* of substantive law (not constitutional limitations on the permissible scope of a state's substantive law). In our case we must ask whether New York's substantive law would constitutionally apply to the facts we review, not whether New York could permissibly choose to apply its law (the choice of which substantive law to apply being an issue reserved to Pennsylvania law). Put colloquially, applying choice-of-law principles to the analysis of the constitutional scope of New York's substantive law mixes apples and oranges. For our purposes, it is sufficient to conclude that there is no constitutional bar to the application of New York law to this dispute.

C. Does Michigan's Subsection 3 Apply to this Dispute?

As noted, the District Court concluded that Budget could not invoke Michigan's limitation of liability for short-term lessors of cars in subsection 3 because "the lease between Budget Systems and Powell was 'founded on' a misdemeanor—Budget Systems's grant of permission to operate the Xterra without a valid license plate—" and was therefore a "nullity" under Michigan law. *Budget*, 304 F.Supp.2d at 650. The parties vigorously dispute the propriety

of this holding. Because we conclude below that New York's interest in applying its law far outweighs any interest Michigan might have in applying subsection 3 (that is, assuming subsection 3 *would* apply), we find it unnecessary to address the competing, complex statutory interpretation arguments presented by the parties.[8] Instead, we leave the construction question to the State of Michigan and assume without holding that Michigan's subsection 3 would apply and limit Budget's liability in this case. Under this assumption, we turn to New York and Michigan's competing interests.

D. Identification and Weighing of State Interests

In choosing between Michigan and New York law,[9] we consider, *inter alia*, "the relevant policies of [the] interested

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8. If Michigan's subsection 3 does not apply to this case, then only New York has an interest in applying its law and this case would be a "false conflict." New York law would clearly apply. If subsection 3 does apply, Michigan has an interest in applying its law and we must weigh the "true conflict" between its interest and that of New York. Because we conclude that New York's interest trumps in any event, we need not settle the construction of Michigan law because we reach the same result under either construction.

9. It is clear that Pennsylvania does not have an interest in applying its law to this dispute. But for the chance occurrence of the accident in Pennsylvania, there is no connection between the Commonwealth and the parties. Pennsylvania has no interest in securing a recovery for Chappell nor in limiting Budget's liability. The District Court held that Pennsylvania law applied by default under the rule of *lex loci delicti* because neither New York nor Michigan had an interest in applying its law. We have already stated our disagreement with those predicate determinations.

states and the relative interests of those states in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 6 (1971). New York's § 388(1) "was enacted to ensure access by injured persons to a financially responsible [party] against whom to recover for injuries and to change th[e] common-law rule and to impose liability upon the owner of a vehicle for the negligence of a person legally operating the car with the permission, express or implied, of the owner." *Hassan v. Montuori*, 99 N.Y.2d 348, 756 N.Y.S.2d 126, 786 N.E.2d 25, 27 (2003) (internal quotations omitted); *Morris v. Snappy Car Rental*, 84 N.Y.2d 21, 614 N.Y.S.2d 362, 637 N.E.2d 253, 255 (1994). "Another . . . interest is in assuring that New York vendors who furnish medical and hospital care to injured parties are compensated. . . . Finally, New York has a public fiscal interest in assuring that . . . New York State can recoup its welfare expense[s] from [victims'] recover[ies]." *Bray v. Cox*, 39 A.D.2d 299, 333 N.Y.S.2d 783, 785-86 (N.Y.App. Div.1972).

Describing Michigan's subsection 3, the District Court explained that "[i]n response to car rental companies' complaints that Subsection 1[—which provides for unlimited vicarious liability—] was 'inhibiting the growth of the [rental car] industry and threatening to drive some companies out of the state,' the Michigan legislature amended the law in June of 1995 [to add subsection 3]." *Budget*, 304 F.Supp.2d at 648 (quoting *DeHart v. Joe Lunghamer Chevrolet, Inc.*, 239 Mich.App. 181, 607 N.W.2d 417, 420 (1999)). That is, subsection 3 was codified to advance Michigan's interest in preventing rental car companies from deciding not to do business (or to do less business) in the State of Michigan for fear of unlimited vicarious liability.

Appendix A

Having identified the competing state policies implicated by this dispute, we turn to the states' relative interests in those policies. New York's interest is clear, direct and compelling. Chappell is a New York resident receiving treatment and care from medical providers in New York with the aid of New York-administered welfare programs. Each of New York's policy justifications for enacting § 388(1) is directly implicated by this case, and New York's interest runs to the full extent of Chappell's recovery, dollar for dollar. It has an interest in (1) Chappell's full recovery from a financially responsible party, (2) the compensation of New York vendors who furnish medical and hospital care to Chappell, and (3) recouping the State's welfare expenses.

Michigan, unlike New York, does not have an interest in securing a recovery for an injured citizen in this case (or associated state medical expenses). Its only interest lies in the extent of Budget's liability (or, put another way, in the potential application of subsection 3's liability cap). We doubt that Michigan's interest in the application of subsection 3 is implicated at all in this case. Is it plausible that Budget will decide not to do business in the State of Michigan if it is held liable under New York law for an accident that occurred in Pennsylvania involving a car rented in Michigan? In fact, the application of New York's more stringent law in this case likely *advances* Michigan's interest in making it a relatively attractive place for rental car companies to do business by highlighting the value of Michigan's liability cap. And if potential liability in other fora would undermine Budget's decision to do business in Michigan, there are steps it can take to preserve the value of Michigan's liability cap short of pulling out of the State. For example, Budget is free to

limit to intrastate travel the permissible use of vehicles it rents in Michigan. It is similarly free contractually to bar its customers from operating its vehicles in the State of New York. (We note that, far from restricting the use of vehicles in New York, Budget actually rents vehicles in that State, calling into question the necessity of a liability cap to induce rental car companies to do business in a state.) In short, Michigan's interest in this particular dispute is uncertain and tenuous at best.

We thus conclude that New York's interest in the application of its law to this dispute clearly trumps that of Michigan. Thus, under Pennsylvania's choice-of-law rules, New York law is to be applied.

IV. Conclusion

The District Court erred in its conclusion that the facts of this case do not fall within the scope of New York's § 388(1). Because § 388(1) does apply to this case, and because New York's interest in applying that provision clearly outweighs any interest Michigan might (or might not) have in applying its liability cap, under Pennsylvania's choice-of-law rules New York law governs this dispute and Budget faces unlimited vicarious liability. The District Court's judgment is accordingly reversed.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1931

BUDGET RENT-A-CAR SYSTEM, INC.

v.

NICOLE CHAPPELL; JOSEPH POWELL, III,

Nicole Chappell,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 02-cv-08975)
District Judge: Honorable Stewart Dalzell

Argued February 15, 2005

Before: SLOVITER, AMBRO and ALDISERT, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued on February 15, 2005.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated April 1, 2004, is hereby reversed. Costs taxed

against Appellee, Budget Rent-a-Car System, Inc. All of the above in accordance with the opinion of this Court.

ATTEST:
s/ [illegible]
Clerk

Dated: May 5, 2005

Cost taxed in favor of Appellee as follows:

Brief	$187.90
Appendix	$220.00
Reply Brief	$96.10
Sales Tax	$44.10
Docketing Fee	$250.00
Total	$798.10

Certified as a true copy and issued in lieu
of a formal mandate on June 8, 2005

s/ [illegible]

Clerk, U.S. Court of Appeals for the Third Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED MARCH 29, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 02-8975

BUDGET RENT-A-CAR SYSTEM, INC.

v.

NICOLE CHAPPELL and JOSEPH POWELL, III

ORDER

AND NOW, this 29th day of March, 2004, upon consideration of defendant Nicole Chappell's motion for entry of final judgment (docket entry # 44) and plaintiff's response thereto, and the Court finding that:

(a) While driving an automobile that he had rented from Budget Rent-A-Car System, Inc.'s predecessor, Joseph Powell, III fell asleep at the wheel, and the vehicle ran into a guardrail and rolled over, *see Budget Rent-A-Car System, Inc. v. Chappell*, No. 02-8975, 2004 WL 234686 (E.D.Pa. Feb. 2, 2004) (docket entry # 32);

(b) As a result of this accident, Chappell, who was a passenger in the car, suffered serious personal injuries that have left her paraplegic, *id.*;

(c) After Budget's predecessor initiated a declaratory judgment action, Chappell sought to recover for her injuries by bringing (1) a cross-claim against Powell for his own negligence; (2) a counterclaim against Budget for negligent entrustment of its automobile to Powell; and (3) a counterclaim against Budget as the automobile's owner,[1] *see* Answer (docket entry # 7);

(d) On February 2, 2004, we granted summary judgment to Budget on Chappell's Section 388 counterclaim[2] because we determined that Pennsylvania law applied to that claim and Pennsylvania does not impose vicarious liability on a car's owner for the driver's negligence, *see Budget,* 2004 WL 234686, at *8-9;

(e) Chappell now requests that we direct the entry of final judgment on the Section 388 claim pursuant to Fed.R.Civ.P. 54(b);

(f) Rule 54(b) permits the court to "direct the entry of a final judgment as to one or more but fewer than all of the claims . . . upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment";

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1. Chappell predicated this claim on Section 388 of New York's Vehicle and Traffic Law, which makes the owner of an automobile strictly liable to the victims of a driver's negligence.

2. We also entered summary judgment in favor of Budget on its claims for declaratory judgment. Because resolution of Budget's declaratory judgment claims and Chappell's Section 388 counterclaim all depend on whether Section 388 applies here, we shall refer collectively to these claims as the "Section 388 claim."

(g) "[I]n deciding whether there are no just reasons to delay the appeal of individual final judgments in a setting such as this, a district court must take into account judicial administrative interests as well as the equities involved," *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980), and must "clearly articulate the reasons and factors underlying its decision to grant 54(b) certification," *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir.1975);

(h) Among the relevant factors for us to consider are "(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like," *id.*;

(i) Chappell's Section 388 claim raises difficult choice-of-law and constitutional questions upon which her unadjudicated negligence and negligent entrustment claims do not depend;

(j) In view of the significant injuries that Chappell sustained and her consequent serious need, no future developments before us are likely to moot her request for review of our decision on the Section 388 claim;

(k) If it hears Chappell's appeal from our decision, the Court of Appeals would not face the choice-of-law issues a second time because its decision would either confirm our understanding of the relevant principles or inform our handling of the as-yet unadjudicated claims;

(l) There are no claims or counterclaims which could result in set-off against our judgment on the Section 388 claim;

(m) Now denying review of the Section 388 claim would require the parties to incur the heavy expenses of litigating the remaining negligence and negligent entrustment claims—solely to preserve Chappell's right to appeal our decision on the Section 388 claim at a later date—even though her counsel does not appear confident that either of those claims could succeed, *see* Mot. for Final Judgment at 5 ("In the event that an exhaustion of remedies results in a finding of the application of Pennsylvania law with respect to vicarious liability, counsel would strongly recommend to his client, defendant Chappell, that she discontinue with prejudice her remaining counterclaim and crossclaim.");

(n) Budget does not oppose Rule 54(b) certification, *see* Resp. to Mot. for Final Judgment; and

(o) Thus, there is no just reason for delaying our entry of final judgment on Chappell's Section 388 claim and on Budget's declaratory judgment claims;[3]

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3. Certifying the Section 388 issue also affords an institutional advantage. Unlike a district court, the United States Court of Appeals

(Cont'd)

Appendix B

It is hereby ORDERED that:

1. Chappell's motion for entry of final judgment is GRANTED;

2. Pursuant to Fed.R.Civ.P. 54(b), the Clerk shall ENTER final judgment in favor of Budget Rent-A-Car System, Inc. and against Nicole Chappell on the claims in Budget's complaint and on Chappell's Section 388 counterclaim; and

3. The Clerk shall TRANSFER this civil action to our Civil Suspense docket.

BY THE COURT:

s/ Stewart Dalzell
Stewart Dalzell, J.

(Cont'd)

for the Third Circuit may seek a definitive ruling from the New York Court of Appeals on the proper interpretation of Section 388. *See* 3rd Cir. LAR Misc. 110.1 (permitting certification of state law questions to the state's highest court); N.Y. Ct. of App. R. 500.17 (permitting certification from a federal court of appeals, but not a federal district court).

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED FEBRUARY 13, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 02-8975

BUDGET RENT-A-CAR SYSTEM, INC.

v.

NICOLE CHAPPELL and JOSEPH POWELL, III

ORDER

AND NOW, this 12th day of February, 2004, upon consideration of defendant Nicole Chappell's motion for reconsideration (docket entry # 37), and the Court finding that:

(a) In our Memorandum and Order of February 2, 2004, we predicted that the New York Court of Appeals would not interpret Section 388 of that state's Vehicle and Traffic Law to impose vicarious liability upon the owner of a vehicle involved in an accident outside of New York when the vehicle was not registered in New York but was briefly operated in that state prior to the accident because such an interpretation would raise questions about whether the statute violates due process, *see* Mem. at 14-15;

(b) We will grant a motion for reconsideration only if "the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [rendered its decision]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice," *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir.1999);

(c) Chappell asks that we reconsider our predictions about New York law because she believes that we committed clear legal error by not affording proper weight to *Vasquez v. Christian Herald Ass'n*, 186 A.D.2d 467, 588 N.Y.S.2d 291 (App.Div.1992), a four-paragraph decision of New York's intermediate appellate court holding that Section 388 imposed vicarious liability for a Pennsylvania accident on the owner of a car of Pennsylvania registry[1] because the car had been driven "to and from New York," *Id.* at 468, 588 N.Y.S.2d 291;[2]

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1. The *Vasquez* opinion does not identify the state in which the car is registered, and none of Chappell's previous filings explained that the car's owner had registered it in Pennsylvania. Chappell established the car's registry only in her motion for reconsideration. *See* Mot. for Reconsideration Ex. A (reproducing the police report of the *Vasquez* accident).

2. In so holding, the Appellate Division distinguished *Fried v. Seippel*, 80 N.Y.2d 32, 587 N.Y.S.2d 247, 599 N.E.2d 651 (N.Y.1992), without discussing whether applying Section 388 would violate due process. Our mention of the dearth of New York cases addressing this constitutional issue, *see* Mem. at 14 ("We have not found any cases that address the precise question presented

(Cont'd)

(d) In predicting how a state's highest court would rule, we may not disregard the decisions of its intermediate appellate courts, unless we are "'convinced by other persuasive data that the highest court of the state would decide otherwise,'" *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634, 637 (3d Cir.2000) (quoting *West v. AT & T Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 85 L.Ed. 139 (1940));

(e) Because the New York Court of Appeals repeatedly has expressed its reticence to interpret statutes in ways that raise constitutional questions,[3] the United States Supreme Court's decisions recognizing constitutional limitations on the extraterritorial application of state law[4] are "persuasive data" that the New York Court of Appeals would not follow *Vasquez*, a decision that does not acknowledge the existence of such questions;

(f) Thus, it was not clear error to disregard *Vasquez*;

(Cont'd)

here. . . ."), was not meant to suggest that we had not considered *Vasquez* in reaching our earlier decision. We disregarded *Vasquez* because the Appellate Division's sparse opinion did not specify the car's registry and did not consider the constitutional questions that are so central to this case.

3. *See, e.g., Atkinson v. City of New York*, 96 N.Y.2d 809, 727 N.Y.S.2d 376, 751 N.E.2d 455, 456 (N.Y.2001).

4. *See Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S.Ct. 634, 78 L.Ed. 1178 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930).

(g) As an alternative ground for reconsideration, Chappell suggests that we failed to consider Michigan's interest in protecting its resident, Powell, from liability for his own negligence;

(h) Chappell cites no authority for the proposition that Michigan has an interest in protecting negligent tortfeasors who are Michigan residents, and Michigan law belies the existence of any such interest;

(i) Although Michigan law would make Budget jointly and severally liable for Powell's negligence, Budget's joint and several liability does not diminish Powell's liability;

(j) To the extent that Michigan law would enforce a judgment that Chappell might obtain against Budget, that company could bring an action for contribution against Powell; and

(k) Thus, Michigan law does not suggest that Michigan has any interest in protecting negligent drivers like Powell;

It is hereby ORDERED that Chappell's motion for reconsideration is DENIED.

BY THE COURT:

s/ Stewart Dalzell
Stewart Dalzell, J.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED FEBRUARY 2, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 02-8975

BUDGET RENT-A-CAR SYSTEM, INC.

v.

NICOLE CHAPPELL and JOSEPH POWELL, III

MEMORANDUM

Dalzell, District Judge.

Joseph Powell, III rented a car from Budget Rent-A-Car Systems, Inc. in Michigan and drove it to New York, where he picked up Nicole Chappell. While Powell was driving through Pennsylvania with Chappell, the car was involved in an accident, and Chappell suffered serious injuries. Budget brought this action for a declaratory judgment on the extent of its vicarious liability for Powell's negligence. The parties'

cross-motions for summary judgment, which raise vexing and consequential choice of law problems, are now before us.[1]

Factual Background

While visiting North Carolina in August of 2001, twenty-six year old Nicole Chappell of New York met Joseph Powell, III, a Michigan resident who had nearly reached his twenty-first birthday. Simon Decl. Ex. A ("Stip.") ¶ 1, Ex. B ("Chappell Decl.") ¶¶ 2-3. Even after returning to their homes, Chappell and Powell maintained a friendship through weekly telephone conversations and occasional reunions. *Id.* ¶ 3. As Valentine's Day, 2002, approached, Powell planned to surprise Chappell by driving from Michigan to New York

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1. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n. 10, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" *Id.* at 587, 106 S.Ct. 1348 (quoting Fed.R.Civ.P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52, 106 S.Ct. 2505; *Tabas v. Tabas*, 47 F.3d 1280, 1287 (3d Cir.1995) (en banc).

to deliver roses and a bracelet. Simon Decl. Ex. D. ("Powell Dep.") at 10. Thus, in late January of 2002, he began his preparations by arranging for a one week rental of a Ford Explorer from Budget Rent-A-Car Systems, Inc. ("Budget Systems")[2] in Warren, Michigan. Stip. ¶ 11.

For reasons that will become apparent later, we now consider at length minutiae that in any other context would be far too arcane to warrant mention.

On January 30, 2002, Nissan North America, Inc. transferred a 2002 Nissan Xterra with Vehicle Identification Number 5N1ED28Y02C532670 (the "Xterra") to a Nissan dealership in Florida, and the dealership promptly transferred that vehicle to Budget Systems in Michigan. Simon Decl. Ex. J. Assuming that Budget Systems followed its regular procedures, after the Xterra arrived in Romulus, Michigan, a Budget Systems fleet clerk obtained Michigan license plate NVQ532 and placed that plate on one of the Xterra's seats. Simon Decl. Ex. F ("Schenk Dep.") at 3, 5-19; Stip. ¶ 12.[3]

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2. Budget Systems was a Delaware corporation that maintained its principal place of business in Illinois. It was also a subsidiary of Budget Group, Inc. ("Budget Group"). Stip. ¶ 4.

3. The fleet clerk would have obtained the plate from a "lot inventory" of plates that had been affixed to other vehicles that were taken out of service. Schenk Dep. at 19. Michigan license plate NVQ532 was registered for use with a 2001 Ford with Vehicle Identification Number 1FAFP55201G235610 (the "Ford") that Team Fleet Financial Corporation ("Team Fleet") owned. Simon Decl. Ex. I. Team Fleet leased its vehicles to "affiliated" companies. *See* Def.'s Mot. to File Surreply Br. Ex. C. We infer that Team Fleet leased its

(Cont'd)

A "lot person" later removed the plate from the Xterra's seat and affixed it to the vehicle.[4] Schenk Dep. at 14, 19. After placing the plate in the Xterra, the fleet clerk wrote license plate number "NVQ532" at the top of the vehicle's certificate of origin and took the certificate to the office of Michigan's Secretary of State. Schenk Dep. at 21-23; Simon Decl. Ex. J.[5] Someone unknown crossed out the fleet clerk's initial reference to "NVQ532" and wrote "PHS756" next to it. *See* Schenk Dep. at 37-38; Simon Decl. Ex. J.

An employee at the Secretary of State's office used the certificate of origin, including the handwritten annotation for the license plate, to register the Xterra and to create an Application for Michigan Vehicle Title for it. Schenk Dep. at 21-29. Because someone had written "PHS756" on the certificate of origin, the Secretary of State's office registered the Xterra with Michigan license plate PHS756

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vehicles to Budget Systems because both Budget Systems and Team Fleet were wholly owned subsidiaries of Budget Group. *See* Def.'s Mot. to File Surreply Br. Ex D. Attach. I. Because of the corporations' close affiliation, we are not surprised that Budget Systems's fleet clerk would have had access to a plate registered to a vehicle that Team Fleet owned.

4. The lot person must have affixed the plate before February 12, 2002 because the Xterra bore that plate on that day. *See* Stip. ¶ 12.

5. The Xterra was registered and the title application was filed on February 13, 2003, *see* Simon Decl. Exs. E, K; Schenk Dep. at 34, so we can be sure only that the fleet clerk submitted the certificate of origin sometime on or before that date.

and prepared a title application for the transfer of Michigan license plate PHS756 to the Xterra. *See* Simon Decl. Exs. E, K; Schenk Dep. at 39-40.

After the lot person affixed Michigan license plate NVQ532 to the Xterra, but before the Secretary of State had registered the vehicle, Budget Systems transported it about thirty miles from Romulus, Michigan to Warren, Michigan.

The morning of February 12, 2002, Powell arrived at Budget Systems's Warren, Michigan location to pick up the Ford Explorer that he had reserved a few weeks before. Because there were no Ford Explorers available at that time, a Budget Systems rental agent suggested that Powell take the Xterra instead. Stip. ¶ 13. Powell agreed to the substitution, signed a Rental Agreement,[6] and drove away with the Xterra. Stip. ¶ 12. As Powell drove away from Budget Systems's Warren, Michigan location, the Xterra bore Michigan license plate NVQ532, *id.*, and was not yet registered.

After a short rest, Powell drove the Xterra for eight consecutive hours and reached Chappell's home around 11:00 p.m. on Tuesday, February 12, 2002. Simon Decl. Ex. D ("Powell Dep.") at 16; Chappell Decl. ¶ 5. Powell remained

6. The Rental Agreement governed the terms according to which Budget Systems rented a Nissan Xterra with Michigan license plate NVQ532 to Powell. Simon Decl. Ex. C ("Rental Agreement"). Among its many provisions, the Rental Agreement explained that Budget Systems would "provide[ ] protection for bodily injury (including death) and property damage resulting from use or operation of the vehicle, limited as follows: Budget [Systems's] protection will not exceed the minimum financial responsibility limits . . . required by applicable law." *Id.* ¶ 5.

in New York for the rest of the week while Chappell worked. On the evening of Friday, February 15, after Chappell completed her work week, she and Powell left New York in the Xterra. They planned to spend the weekend together in Michigan. Chappell Decl. ¶¶ 5-6.

While driving through Pennsylvania early the next morning, Powell fell asleep at the wheel of the Xterra. The car drifted from the left lane of Interstate 80, across the right lane, and into the right guardrail, causing it to roll over. Simon Decl. Ex. H ("Accident Report") at 8. Powell escaped the crash largely unscathed, but the force of impact ejected Chappell from the Xterra. *Id.* at 4. A helicopter transported her from the scene of the accident to Mercy Hospital in Pittsburgh, where doctors diagnosed, among other injuries, a broken femur, broken ribs, and spinal injuries. Simon Decl. Ex. P ("Carfi Decl."). These injuries have rendered Chappell permanently paraplegic. *Id.*

Budget Systems initiated this action for a declaratory judgment against Powell and Chappell and asks us to determine which state's law governs the extent of its vicarious liability for Powell's negligence. Compl. at 4. Chappell brought two counterclaims against Budget Systems[7] and a cross-claim against Powell.

Even before this suit began, Budget Group and several of its subsidiaries, including Budget Systems, had filed a

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7. Chappell's first counterclaim is based on Section 388 of New York's Vehicle and Traffic Law, and her second counterclaim states a negligent entrustment theory.

voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Stip. ¶ 5. With Budget Group unable to reorganize itself successfully, United States Bankruptcy Judge Mary F. Walrath approved an agreement in which, among other things, Cherokee Acquisition Corporation ("Cherokee") assumed Budget Systems's liability in this case. Simon Decl. Ex. M §§ 2.2(ii), 2.5(a)(iv). Soon after the transfer, Cherokee changed its name to Budget Rent-A-Car System, Inc. ("Budget").[8] Stip. ¶ 8. We allowed this case to proceed with Budget as a substitute plaintiff for Budget Systems, and Budget and Chappell have filed cross-motions for summary judgment on Budget's claim for a declaratory judgment.

Analysis

As noted, the parties seek a declaratory judgment as to whether the law of New York or Michigan governs the extent of Budget's vicarious liability to Chappell for Powell's negligence. Like any federal court faced with a choice of law issue, we apply the choice-of-law rules of the state in which we sit. *See Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Thus, Pennsylvania choice-of-law rules will determine whether New York or Michigan substantive law controls the disposition of the declaratory judgment action.

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8. Cherokee was and Budget is a Delaware corporation that maintained its principal place of business in New Jersey. *See* Stip. ¶¶ 7- 9.

Appendix D

A. *Choice of Law Framework*

In *Griffith v. United Air Lines, Inc.*, 203 A.2d 796, 805, 416 Pa. 1, 21 (1964), the Pennsylvania Supreme Court abandoned the traditional *lex loci delicti* rule[9] "in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court." Our Court of Appeals has explained that the *Griffith* "methodology combines the approaches of both Restatement II (contacts establishing significant relationships) and 'interest analysis' (qualitative appraisal of the relevant States' policies with respect to the controversy)." *Melville v. American Home Assurance Co.*, 584 F.2d 1306, 1311 (3d Cir.1978).

In applying *Griffith*'s "hybrid" approach, we begin with an "interest analysis" of the policies of all interested states and then—based on the results of that analysis—proceed to characterize the case as a true conflict, false conflict, or unprovided-for case. *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 187 & n. 15 (3d Cir.1991); *see also LeJeune v. Bliss-Salem, Inc.*, 85 F.3d 1069, 1071 (3d Cir.1996). A true conflict exists "when the governmental interests of *both* jurisdictions would be impaired if their law were not applied." *Lacey*, 932 F.2d at 187 n. 15. On the other hand, there is a false conflict "if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law." *Id.*, at 187. An unprovided-for case arises when neither

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9. According to the *lex loci delicti* rule, the law of the place of wrong governs the substantive rights of the parties in a personal injury action. *See Griffith*, 203 A.2d at 801, 416 Pa. at 11-12.

jurisdiction's interests would be impaired if their law were not applied.

When interest analysis identifies a false conflict or an unprovided-for case, resolving the choice-of-law issues becomes relatively straightforward. In false conflicts, the Court applies the law of the only interested jurisdiction. *See, e.g., Kuchinic v. McCrory,* 222 A.2d 897, 899-900, 422 Pa. 620, 623-24 (1966) (applying Pennsylvania law when Georgia was not a "concerned jurisdiction"); *Griffith v. United Air Lines, Inc.,* 203 A.2d 796, 807, 416 Pa. 1, 25 (1964) (applying Pennsylvania law when Pennsylvania had an interest in having its law applied but Colorado had no such interest). *Lex loci delicti,* however, continues to govern unprovided-for cases. *See, e.g., Miller v. Gay,* 323 Pa.Super. 466, 470 A.2d 1353, 1355-56 (1983) (applying Delaware law by default when automobile accident occurred in Delaware and neither Delaware nor Pennsylvania had interests in application of their law). True conflicts are much more complex.[10]

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10. If a case presents a true conflict, then Pennsylvania choice-of-law rules "call for the application of the law of the state having the most significant contacts or relationships with the particular issue." *In re Estate of Agostini,* 311 Pa.Super. 233, 457 A.2d 861, 871 (1983). To identify the jurisdiction with the most significant relationship, courts apply Section 145 of the Second Restatement of Conflict of Laws. *See Troxel v. A.I. duPont Inst. (Appeal of Browngoehl),* 431 Pa.Super. 464, 636 A.2d 1179, 1180 (1994) (describing the adoption of "the 'significant relationship' approach of Section 145").

According to Section 145, courts should consider four contacts when identifying the jurisdiction with the most significant

(Cont'd)

Appendix D

To resolve the choice-of-law questions raised here, we first determine the extent of Budget's vicarious liability for Chappell's negligence under the laws of each of the relevant states. Only then may we classify this case as a true conflict, false conflict, or unprovided-for case.

B. *Sources of Law*

Chappell argues that New York law should control the resolution of this case. *See* Def.'s Mem. Supp. Mot. Summ. J. at 1. Budget, on the other hand, insists that Michigan law governs. *See* Pl.'s Mem. Supp. Mot. Summ. J. at 4. By advancing these positions, the parties agree that no other state's law should apply,[11] so we limit our analysis to the laws of New York and Michigan. -

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relationship to the issues in the case: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the residence, place of incorporation, and place of business of the parties; and (d) the place where the parties' relationship is centered. Restatement (Second) of Conflict of Laws § 145 (1971). "The weight of a particular state's contacts must be measured on a qualitative rather than quantitative scale," *Cipolla v. Shaposka*, 267 A.2d 854, 856, 439 Pa. 563, 566 (1970), and the appropriate weight given to any particular contact depends on that contact's significance under the principles enumerated in Section 6. Such principles include (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. Restatement (Second) of Conflict of Laws § 6 (1971).

11. Had the parties not so agreed, we might have considered
(Cont'd)

Appendix D

1. *New York*

At common law, the owner of an automobile who allowed another to drive it was not always vicariously liable for the driver's negligence. *See Selles v. Smith*, 4 N.Y.2d 412, 176 N.Y.S.2d 267, 151 N.E.2d 838, 840 (1958). Although the owner could be vicariously liable for the driver's negligence if the driver was her employee or she could be liable for her own negligent entrustment of the vehicle to an unsafe driver, ownership alone was not enough to establish vicarious liability. *See Gochee v. Wagner*, 257 N.Y. 344, 178 N.E. 553, 553 (1931). By depriving plaintiffs of a cause of action against an automobile's owner, the common law failed to compensate victims of judgment-proof drivers.

To mitigate the perceived shortcomings of the common law, New York's legislature enacted a new statute, which—in its current form—provides that "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries to person . . . resulting from negligence in the use or operation of such vehicle. . . ." N.Y. Veh. & Traf. Law § 388(1) (Consol.2003). The New York legislature passed Section 388 because it "intended that the injured party be afforded a financially responsible insured person against whom to recover for injuries." *Plath v. Justus*, 28 N.Y.2d 16, 319 N.Y.S.2d 433, 268 N.E.2d 117, 119 (1971).

Whether Section 388 applies here depends upon whether the Xterra was "a vehicle used or operated" in New York,

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the applicability of the law of Pennsylvania, the state where the accident occurred; Delaware, the state where Budget Systems was incorporated; and/or Illinois, the state of Budget Systems's principal place of business.

within the meaning of the statute. At first glance, the Xterra seems to be such a vehicle because Powell did indeed operate it in New York. Still, we cannot ignore that an expansive interpretation—one which applied Section 388 to any vehicle that was *ever* operated in New York—could lead to absurd results.[12] Although New York's legislature could not have intended for Section 388 to apply whenever a vehicle has *ever* been driven in New York, that state's highest court has repeatedly held that the legislature did intend for Section

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12. Imagine, for example, that Powell and Chappell were never involved in an accident and that they returned the Xterra safely to Budget. If Budget later rented the Xterra to another Michigan resident, who drove the vehicle only in Michigan and through whose negligent operation a Michigan resident was injured, then a broad interpretation of Section 388 would allow the injured Michigan resident to argue that the New York law imposed liability on Budget because the Xterra was a vehicle that was once operated in New York.

While it is not likely that any court would choose to apply New York law to those facts, this portion of our opinion does not focus on the choice-of-law issues. Rather, we pose the above hypothetical to illustrate the absurdity of interpreting Section 388's coverage too broadly. Only after we determine the proper interpretation of Section 388 may we use Pennsylvania choice-of-law rules to decide whether it is proper to apply that interpretation to the facts of this case.

Because we focus first on the issue of whether Section 388 covers these facts, we do not address the myriad cases that have considered the applicability of that statute based on choice-of-law principles. *Klaxon* requires that we use Pennsylvania choice-of-law rules to determine which law applies, so any case that employs some other methodology cannot guide our inquiry.

388 to apply in some situations where the accident occurred outside of New York.

In *Farber v. Smolack*, 20 N.Y.2d 198, 282 N.Y.S.2d 248, 229 N.E.2d 36 (1967), for example, Robert Smolack loaned his automobile to his brother, Arthur, so that he could drive his family to Florida and back. While in North Carolina, Arthur's negligent decision to continue driving at an unsafe speed while the car was "pulling" caused an accident in which his wife was killed and his two sons were injured. All of the parties were New York residents and the car was registered in New York. Representatives of the wife's estate and of the children sued Robert under Section 388, but the trial court dismissed the claim. When the case reached the New York Court of Appeals, it held:

> [W]hen a fatal accident occurs out of State and New York is . . . the jurisdiction having "the most significant relationship" with the issue presented, [Section 388] determines the rights of the victim's survivors. To the extent that earlier decisions declined to give extraterritorial effect to the statute, they are overruled.

Id. at 40 (citations omitted). Subsequent decisions confirmed that Section 388 could apply to accidents that occurred outside of New York. *See, e.g., Sentry Ins. Co. v. Amsel*, 36 N.Y.2d 291, 367 N.Y.S.2d 480, 327 N.E.2d 635, 637 (1975) ("The legislative history of section 388 of the Vehicle and Traffic Law indicates that the Legislature intended to enlarge the vehicle owner's vicarious liability and not to draw the line at the border.").

Appendix D

Despite its holdings that Section 388 covered some extraterritorial accidents, the Court of Appeals has recognized that the law's reach is not unlimited. In *Fried v. Seippel*, 80 N.Y.2d 32, 587 N.Y.S.2d 247, 599 N.E.2d 651 (1992), Avis, which operated in New York, owned the Jamaican car rental company that rented a vehicle of Jamaican registry to Seippel, a New York resident. While Seippel was driving in Jamaica, he negligently caused a head-on collision by crossing the dividing line of a two-lane, two-way road. Fried, Seippel's passenger and also a New York resident, died in the accident. The representative of Fried's estate sued Avis under Section 388, and the trial court denied Avis's motion for summary judgment based on the Jamaican company's ownership of the vehicle. Putting aside the issue of whether Avis could be held vicariously liable when its affiliate actually owned the vehicle, the Court of Appeals held that "vicarious liability imposed by section 388(1) does not extend to owners of vehicles that have never been registered, used, operated or intended for use within this State." *Id.* at 654.

Read together, *Farber* and *Fried* explain that Section 388 applies extraterritorially in some situations, but within limits. These limits focus solely on the vehicle itself and not on other factors that may influence a choice-of-law analysis, such as the parties' residence.[13] *Fried* presents an example of a vehicle that was radically disconnected from New York; it was not registered in New York, and it had never been driven in New York. By contrast, *Farber* involved a car that

13. It is not surprising that the Court of Appeals has not focused on the parties' residence when considering the situations in which Section 388 applies extraterritorially because the statute's text focuses on the "vehicle" and not on the parties.

was registered in New York and that became involved in an out-of-state accident during one of the brief periods when it was not operated in-state. The facts here fall in the middle ground between *Farber* and *Fried* because the Xterra was not registered in New York but Powell did drive it there.

We have not found any cases that address the precise question presented here: whether Section 388 imposes vicarious liability on the owner of a vehicle involved in an accident outside of New York when the vehicle was not registered in New York but was briefly operated in New York before the accident.[14] Faced with the choice between two interpretations of its law—one finding that it covered a vehicle whose only connection with the state was its brief presence therein and another holding that the statute did not reach so far—we predict that the New York Court of Appeals would recognize that the United States Supreme Court has held that due process forbids states from regulating extraterritorial activities with which they have "slight" or "casual" connection. *See Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 150, 54 S.Ct. 634, 78

14. Chappell cites *Cunningham v. McNair*, 48 A.D.2d 546, 370 N.Y.S.2d 577 (1st Dep't 1975), as authority for the applicability of Section 388, but *Cunningham* is not persuasive because it relies on New York choice-of-law analysis rather than direct consideration of whether Section 388 applies extraterritorially. Moreover, *Cunningham* has been criticized as an incorrect statement of New York law. *See Fried v. Seippel*, 80 N.Y.2d 32, 587 N.Y.S.2d 247, 599 N.E.2d 651, 655 (1992); *Klippel v. U-Haul Co.*, 759 F.2d 1176, 1181 (4th Cir.1985); *see also* Peter E. Herzog, *Conflict of Laws*, 31 Syracuse L.Rev. 89, 104-05 (1980); Peter E. Herzog, *Conflict of Laws*, 27 Syracuse L.Rev. 17, 29- 31 (1976).

L.Ed. 1178 (1934); *see also Home Ins. Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930). To avoid the serious constitutional questions that interpreting Section 388 to cover the facts of this case would raise, the New York courts would conclude that the New York legislature did not intend for Section 388's reference to "vehicle[s] used or operated" in New York to cover vehicles that are registered outside of New York and that were not being used or operated in New York at the time of an accident. *See, e.g., Atkinson v. City of New York*, 96 N.Y.2d 809, 727 N.Y.S.2d 376, 751 N.E.2d 455, 456 (2001) (choosing "to interpret the [statute in question] to avoid . . . constitutional concerns").

Because the Xterra was not registered in New York at the time that the Pennsylvania accident occurred, Section 388 would not impose vicarious liability on its owner. As there is no other basis for the imposition of such liability on Budget, we conclude that, under New York law, Budget is not vicariously liable to Chappell.

2. *Michigan*

As in New York, the common law of Michigan did not mechanically hold an automobile's owner vicariously liable for the driver's negligence. *See Hartley v. Miller*, 165 Mich. 115, 130 N.W. 336, 337 (1911). In certain cases—for example, when the driver operated the vehicle as an employee of the owner within the course of his employment—the owner could be liable for the driver's negligence, but liability depended on facts other than mere ownership. *See, e.g., Riley v. Roach*, 168 Mich. 294, 134 N.W. 14, 18-19 (1912) (refusing to hold vehicle's owner liable for negligence of his chauffeur

when the chauffeur drove the vehicle against the owner's orders). The upshot of the common law rule was that "generally the driver of the commercial motor vehicle whose negligence caused the accident was financially irresponsible and the financially responsible owner escaped liability." *Kalinowski v. Odlewany*, 289 Mich. 684, 287 N.W. 344, 349 (1939).

"[T]o place the risk of damage or injury upon the person who has the ultimate control of the vehicle," *Roberts v. Posey*, 386 Mich. 656, 194 N.W.2d 310, 312 (1972), the Michigan legislature supplemented the common law with a new statute. As currently codified, that statute declares that:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law. The owner is not liable unless the motor vehicle is being driven with his or her express or implied consent or knowledge.

Mich. Comp. Laws § 257.401(1) (2003) ("Subsection 1"). The Michigan Supreme Court has interpreted this language to impose vicarious liability on a vehicle's owner when the driver's negligence causes an accident in another state so long as the owner-driver relationship was centered in Michigan. *See Sexton v. Ryder Truck Rental, Inc.*, 413 Mich. 406, 320 N.W.2d 843 (1982).

Appendix D

In response to car rental companies' complaints that Subsection 1 was "inhibiting the growth of the industry and threatening to drive some companies out of the state," the Michigan legislature amended the law in June of 1995. *DeHart v. Joe Lunghamer Chevrolet, Inc.*, 239 Mich.App. 181, 607 N.W.2d 417, 420 (1999). A new subsection provides that:

> [A] person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle under a lease providing for the use of the motor vehicle by the lessee for a period of 30 days or less is liable for an injury caused by the negligent operation of the leased motor vehicle only if the injury occurred while the leased motor vehicle was being operated by an authorized driver under the lease agreement. . . . Unless the lessor, or his or her agent, was negligent in the leasing of the motor vehicle, the lessor's liability under this subsection is limited to $20,000.00 because of bodily injury to or death of 1 person in any 1 accident and $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.

Mich. Comp. Laws § 257.401(3) (2003) ("Subsection 3"). Michigan's intermediate appellate court has held that Subsection 3's cap on rental car companies' vicarious liability is constitutional. *Phillips v. Mirac, Inc.*, 251 Mich.App. 586, 651 N.W.2d 437 (2002).

Budget insists that Subsection 3 limits its vicarious liability to Chappell to $20,000.00. *See* Pl.'s Mem. Supp.

Mot. Summ. J. at 13. Chappell, however, argues that Budget may not receive the benefit of the cap because Budget is not a "lessor of a motor vehicle under a lease," within the meaning of Subsection 3. According to this argument, the Rental Agreement between Budget and Powell is not a legally valid "lease" because Budget allowed Powell to drive the Xterra even though it did not bear the license plate that the Secretary of State had assigned to it. *See* Def.'s Mem. Supp. Mot. Summ. J. at 11-19.

At the time of the accident, it was a misdemeanor for "an owner knowingly [to] permit to be operated, upon any highway, a vehicle required to be registered ... unless there is attached to and displayed on the vehicle ... a valid registration plate issued for the vehicle." Mich. Comp. Laws § 257.255(1), (2) (2001).[15] Whether Budget committed a misdemeanor by leasing the Xterra to Powell while it bore license plate NVQ532 depends on two factors: (1) whether license plate NVQ532 was a valid registration plate issued for the Xterra; and (2) whether Budget acted with the requisite state of mind.

Budget concedes that it did not follow the regular procedures for registering the Xterra, *see* Mich. Comp. Laws § 257.217(1), but it maintains that it complied with an alternative procedure described as follows:

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15. In 2003, the Michigan legislature amended the statute so that permitting a vehicle to be operated without a valid plate is now a "civil infraction"—not a misdemeanor—*see* 2003 Mich. Pub. Acts 9, but this amendment does not affect our disposition of the case because the change occurred well after the February 16, 2002 accident.

Appendix D

> If a vehicle is delivered to a purchaser or lessee who has valid Michigan registration plates that are to be transferred to the vehicle, and an application for title, if required, and registration for the vehicle is not made before delivery of the vehicle to the purchaser or lessee, the registration plates shall be affixed to the vehicle immediately, and the dealer shall provide the purchaser or lessee with an instrument in writing, on a form prescribed by the secretary of state, which shall serve as a temporary registration for the vehicle for a period of 15 days from the date the vehicle is delivered.

Mich. Comp. Laws § 257.217(6) (2003). Through this procedure, a purchaser of a vehicle acquires a "temporary registration" when it transfers a license plate from one of its vehicles to a newly acquired vehicle. Unfortunately for Budget, however, the alternative procedure does not permit a purchaser to transfer a plate from a vehicle that it does not own to another vehicle that it does. Here, Team Fleet owned the Ford to which license plate NVQ532 was registered, but Budget Systems attached the plate to its own Xterra. Because Budget Systems and Team Fleet are distinct corporate entities, affixing license plate NVQ532 to the Xterra did not effect a temporary registration.[16] Budget Systems observed neither the regular nor the alternative registration procedures, and thus we find that, at the time that Budget permitted Powell to drive it, the Xterra did not bear a "valid registration plate issued for the vehicle."

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16. It surely does no injustice to Budget Group to respect corporate formalities of its own making.

Still, Budget System's conduct would have amounted to a misdemeanor only if it "knowingly" permitted Powell to drive the Xterra while license plate NVQ532 was attached to it. This issue need not detain us long because Budget Systems prepared the Rental Agreement that specifically identifies the Xterra's license plate as Michigan license plate NVQ532. *See* Simon Decl. Ex. C. In view of this evidence, we hold that no reasonable jury could conclude that Budget did not "knowingly" permit Powell to drive the Xterra with an invalid license plate.

By leasing him the Xterra, Budget Systems knowingly permitted Powell to operate it without a valid registration plate, and Michigan law made such conduct a misdemeanor at the time it occurred. *See* Mich. Comp. Laws § 257.255(2) (2001). In similar situations, the Michigan Supreme Court consistently has held that "all contracts which are founded on an act prohibited by a statute under a penalty are void, although not expressly declared to be so." *Shattuck v. Watson*, 164 Mich. 167, 129 N.W. 196, 199 (1910); *see also Bayer v. Jackson City Bank & Trust Co.*, 335 Mich. 99, 55 N.W.2d 746, 749 (1952) ("[F]ailure to comply in any transaction with statutory requirements, when noncompliance is declared unlawful and subject to penalty, renders the transaction void.").

Here, the lease between Budget Systems and Powell was "founded on" a misdemeanor—Budget Systems's grant of permission to operate the Xterra without a valid license plate—so the lease is void. Since Michigan law treats the lease as a nullity, Budget Systems was not a "lessor of a motor vehicle under a lease," and Subsection 3's cap on car rental

companies' vicarious liability does not apply to the facts of this case.

We conclude, therefore, that Michigan law imposes unlimited vicarious liability on Budget for Powell's negligence. *See* Mich. Comp. Laws § 257.401(1) (2003).[17]

C. *The Chosen Law*

Having explained the relevant principles of New York and Michigan law, we must examine these states' interests so that we may classify this case as a true conflict, a false conflict, or an unprovided-for case.

New York's law expresses an interest in its residents receiving compensation for injuries they sustain from automobile accidents. *See* N.Y. Veh. & Traf. Law § 388(1) (Consol.2003). In this case, however, applying New York law would not advance that interest because New York statutory law does not protect New York residents who suffer injuries in out-of-state accidents like the one here and New York common law does not permit New York residents to recover from a vehicle's owner. Thus, New York has no interest in the application of its own law.

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17. We reach this result mindful of the delicious irony in how the parties briefed this case. Budget strenuously called for the application of Michigan law, but that law saddles it with unlimited liability for Powell's negligence. On the other hand, Chappell insisted that New York law should control, but New York's common law would allow Budget to escape all liability.

Appendix D

Michigan, too, has an interest in ensuring that its residents receive compensation for the torts that they suffer, but applying Michigan law would neither advance nor inhibit that interest because the tort victim, Chappell, is not a resident of Michigan. Subsection 3 demonstrates that Michigan also has an interest in protecting car rental companies that comply with the law from unlimited vicarious liability. Such an interest, however, is not implicated here because Budget Systems violated Michigan's motor vehicle code, so Michigan would not protect it. In short, Michigan—like New York—has no interest in the application of its own law.

When neither jurisdiction has an interest in the application of its law, Pennsylvania courts classify the lawsuit as an unprovided-for case and apply the *lex loci delicti*, the law of the place where the injury occurred. *See, e.g., Miller v. Gay*, 323 Pa.Super. 466, 470 A.2d 1353, 1355-56 (1983); *Melville v. American Home Assurance Co.*, 443 F.Supp. 1064, 1103-04 (E.D.Pa.1977) (Becker, J.), *rev'd on other grounds*, 584 F.2d 1306 (3d Cir.1978). Here, the accident occurred in Pennsylvania, so we hold that Pennsylvania law determines the extent of Budget's vicarious liability. Pennsylvania has never modified the common law rule that, absent an employer-employee relationship, an automobile's owner is not vicariously liable for the negligence of the driver. *See Solomon v. Commonwealth Trust Co.*, 256 Pa. 55, 100 A. 534 (1917). Thus, Budget is not vicariously liable to Chappell for Powell's negligence.

Appendix D

Conclusion

Following Pennsylvania's choice-of-law methodology, we have concluded that Pennsylvania law controls the resolution of the issues in this case. Because Chappell's motion for summary judgment requests that we apply New York law, we shall deny her motion. Budget's complaint seeks a declaratory judgment about which jurisdiction's law controls its liability to Chappell. We shall grant summary judgment to Budget on the claims in its complaint and declare that, under Pennsylvania law, Chappell may not recover from Budget for Powell's negligence.

Although these rulings dispose of Budget's claims, we must also address Chappell's counterclaims against Budget and her cross-claim against Powell. We shall dismiss Chappell's Section 388 counterclaim because it fails to state a claim upon which relief may be granted under Pennsylvania law, *see* Fed.R.Civ.P. 12(b)(6), but her counterclaim for Budget's negligent entrustment of the Xterra to Powell may proceed. As for the cross-claim, we note that Chappell's attorney is also Powell's attorney-of-record. The identity of counsel suggests that Chappell never served the cross-claim on Powell,[18] so we shall dismiss the cross-claim for failure to serve unless Chappell or her counsel promptly files an affidavit stating that she or he has served copies of the cross-claim and this Memorandum and Order.

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18. We assume that Chappell never served the cross-claim because the attorney would have become involved in a conflict of interest if Powell were a party to the cross-claim.

Appendix D

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA**

CIVIL ACTION

NO. 02-8975

BUDGET RENT-A-CAR SYSTEM, INC.

v.

NICOLE CHAPPELL and JOSEPH POWELL, III

ORDER

AND NOW, this 2nd day of February, 2004, upon consideration of plaintiff's motion for summary judgment (docket entry # 23), defendant Nicole Chappell's opposition thereto, Chappell's motion for summary judgment (docket entry # 24), plaintiff's reply, Chappell's motion for leave to file a reply (docket entry # 28), plaintiff's motion for leave to file a reply (docket entry # 30), and Chappell's motion for leave to file a surreply (docket entry # 31), and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Chappell's motion for leave to file a reply is GRANTED;

2. The Clerk shall DOCKET Chappell's reply, which is attached hereto, as docket entry # 32;

3. Plaintiff's motion for leave to file a reply is GRANTED;

4. The Clerk shall DOCKET plaintiff's reply, which is attached hereto, as docket entry # 33;

5. Chappell's motion for leave to file a surreply is GRANTED;

6. The Clerk shall DOCKET Chappell's surreply, which is attached hereto, as docket entry # 34;

7. Chappell's motion for summary judgment is DENIED;

8. Plaintiff's motion for summary judgment is GRANTED IN PART; and

9. It is hereby DECLARED that Pennsylvania law governs Budget Rent-A-Car System, Inc.'s vicarious liability for Joseph Powell, III's negligence;

10. It is hereby DECLARED that, pursuant to the law of Pennsylvania, Budget Rent-A-Car System, Inc. is not liability to Nicole Chappell for Joseph Powell, III's negligence;

11. Chappell's first counterclaim is DISMISSED;

Appendix D

12. By February 6, 2004, Chappell or her counsel shall FILE an affidavit stating that she or he has served copies of the cross-claim and this Memorandum and Order upon Joseph Powell, III, or we shall dismiss the cross-claim; and

13. Joseph Powell, III shall FILE a response to the cross-claim by February 23, 2004.

BY THE COURT:
s/ Stewart Dalzell
Stewart Dalzell, J.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 31, 2005

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1931

BUDGET RENT-A-CAR SYSTEM, INC.

v.

NICOLE CHAPPELL;
JOSEPH POWELL, III

Nicole Chappell,
Appellant

Present: SCIRICA, *Chief Judge* SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN and ALDISERT* *Circuit Judges*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellee having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in

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* Senior Judge Aldisert, who sat on the original panel, is limited to panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Arnbro, Circuit Judge

Dated: May 31, 2005

CRG/cc: Roger L. Simon, Esq.
Stephen A. Scheuerle, Esq.

SUPREME COURT, U.S.
FILED
SEP 28 2005
OFFICE OF THE CLERK

No. 05-281

IN THE

Supreme Court of the United States

BUDGET RENT-A-CAR SYSTEM, INC.,

Petitioner,

v.

NICOLE CHAPPELL, JOSEPH POWELL, III,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NICOLE CHAPPELL

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QUESTION PRESENTED

Whether this Court should review the proper application by the Third Circuit of state law and the Third Circuit's proper application of this Court's precedent in determining that New York law may be applied in a constitutionally permissible manner to resolve this Pennsylvania choice-of-law analysis.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	4
I. THE PETITIONER FAILS TO DEMONSTRATE ANY CONFLICT AMONG THE CIRCUITS	4
II. NO CONFLICT EXISTS BETWEEN THE THIRD CIRCUIT AND NEW YORK'S COURT OF APPEALS	6
III. NEW YORK LAW MAY BE APPLIED IN A CONSTITUTIONALLY PERMISSIBLE MANNER	7
IV. THE DECISION BELOW IS PLAINLY CORRECT	10
CONCLUSION	10

TABLE OF CITED AUTHORITIES

CASES *Page*

Allstate Ins. Co. v. Hague,
449 U.S.312 (1981) 2, 3, 7, 8, 9

Farber v. Smolack,
229 N.E..2d 36, 20 N.Y.2d 198 (N.Y.1967) 7

Fried v. Seippell,
599 N.E.2d 651, 80 N.Y.2d 32 (N.Y. 1992) .. 3, 5, 6, 7

Hartford Accident & Indem. Co. v. Delta & Pine Land Co.,
292 U.S. 143 (1934) 2

Hassan v. Mortuori,
786 N.E.2d 25, 99 N.Y.S.2d 348 (N.Y. 2003) ... 9

Home Ins. Co. v. Dick,
281 U.S. 397 (1930) 2

Klippel v. U-Haul Co.,
759 F.2d 1176 (4th Cir. 1985) 4, 5, 6

Vasquez v. Christian Herald Association,
186 A.D.2d 467 (1st Dept. 1992), *lv. dismissed*,
610 N.E.2d 392, 81 N.Y.2d 783 (1993) 3, 7

Cited Authorities

Page

STATUTES

N.Y. Veh.& Traf. Law § 388 ..... *passim*

Transportation Equity Act of 2005 § 30106(a) 4

COUNTERSTATEMENT OF THE CASE

On February 12, 2002, Michigan resident Joseph Powell, III presented to Budget Rent-A-Car Systems, Inc. (hereinafter "Budget") in Warren, Michigan and rented a Nissan Xterra. The vehicle was purchased by Budget on February 4, 2002 and placed into service on February 12, 2002. A registration for the vehicle was issued by the Michigan Secretary of State on February 13, 2002. At all times Powell was in possession of the vehicle it bore a license plate belonging to another entity. The act of Budget leasing the unregistered vehicle, and at all times having a license plate affixed which belonged to another entity constituted misdemeanors under various provisions of the Michigan Vehicle Code.

Powell rented the vehicle to travel to New York to surprise New York resident Nicole Chappell for Valentine's Day and present her with a bracelet and flowers. He arrived in New York in the unregistered Xterra on the evening of February 12, 2002. He and the vehicle remained in New York until the evening of February 15, 2002. At that time he and Chappell left New York to travel to Michigan to celebrate President's Day weekend. While traveling through Pennsylvania in the early morning of February 16, 2002, Powell lost control of the car, struck a guardrail thereby causing the vehicle to roll over. As a result Chappell suffered multiple injuries and was rendered paraplegic.

The rental agreement permitted Powell to operate the vehicle anywhere within the continental United States and Canada. As a matter of policy Budget made no inquiry as to where its renters intended to travel. The rental agreement did not contain a choice of law provision. Powell was surcharged $25.00 per day for his age related increased risk

of accident. Despite the fact that Michigan limited the vicarious liability of car rental companies to $20,000.00, Budget maintained $200,000,000.00 in liability coverage on its vehicles, including those registered in Michigan.

Budget commenced a declaratory judgment action in the Eastern District of Pennsylvania seeking a declaration that the laws of the states of either Michigan or Pennsylvania, but not New York, governed its vicarious liability for the negligence of Powell. Chappell asserted a counterclaim for unlimited vicarious liability against Budget under New York law and for negligent entrustment.

Both Budget and Chappell moved for summary judgment on Budget's declaratory judgment action. The district court granted summary judgment in favor of Budget and dismissed Chappell's cause of action sounding in vicarious liability.

In undertaking a Pennsylvania choice-of-law interest analysis the district court found that Michigan had no interest in the case as the registration violations committed by Budget deprived Budget of limited vicarious liability under Michigan law. The district court wrongly concluded that New York had no interest in the outcome of the case. It based its conclusion on its prediction that the application of New York law would raise serious constitutional questions (Pet. App. 49a). In addressing the constitutional issue the district court relied on *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) and *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934). In *Allstate Ins. Co. v. Hague*, 449 U.S. 312 (1981), *Dick* was described as "an extreme example of selection of forum law" *id.* at 311. *Delta* was described as having "scant relevance today" *id.* at 309 n.11.

The Third Circuit properly reversed the district court. It found that New York indeed had an interest in the outcome of the case. The Lower Court determined that the facts fall squarely within the substantive coverage of New York's vicarious liability statute (Vehicle and Traffic Law § 388, hereinafter "VTL 388") as that statute was given construction by New York's highest court in *Fried v. Seippell*, 80 N.Y.2d 32, 599 N.E.2d 651 (N.Y. 1992). *Fried* was followed in the subsequent intermediate court decision of *Vasquez v. Christian Herald Association*, 186 A.D.2d 467 (1st Dept. 1992), *lv. dismissed*, 81 N.Y.2d 783 (1993).

The Third Circuit also properly concluded that New York law may be applied to this dispute in a constitutionally permissible manner. It properly applied the criteria established by this Court in *Hague* to reach its conclusion.

The Third Circuit found it unnecessary to address the legal consequences that flow from Budget's criminal conduct as that conduct impacts Budget's right to limited vicarious liability under Michigan law. Without addressing that issue, the court found Michigan's interest "uncertain and tenuous at best." (Pet. App. 22a). Finding New York to be the state with the greatest interest, the court determined the vicarious liability of Budget to be governed by the laws of the State of New York. Budget's petition for panel rehearing and en banc rehearing was denied.

REASONS FOR DENYING THE PETITION

The petition fails to satisfy any of this Court's criteria for a grant of certiorari. There is no genuine conflict with the decisions of this Court, other circuits or New York's Court of Appeals. The decision below is correct. This case simply involves the application of the facts to this Court's well settled principles of applying a state's law in a constitutionally permissible manner.

Petitioner's attempt to portray this litigation as being of great importance is overblown. As noted by petitioner (Pet. 12) the Transportation Equity Act of 2005 precludes any state from imposing vicarious liability on any entity engaged in the business of leasing or renting of motor vehicles. The section applies to any action commenced on or after August 10, 2005. For all of these reasons, review by this Court is unwarranted.

I. THE PETITIONER FAILS TO DEMONSTRATE ANY CONFLICT AMONG THE CIRCUITS

There is no conflict between the Fourth Circuit's decision in *Klippel v. U-Haul Co.*, 759 F.2d 1176 (4th Cir. 1985) and the Third Circuit's decision below.

Klippel, decided in 1985, required the Fourth Circuit to predict whether New York's highest court would hold VTL 388 applicable. *Klippel* involved an accident in South Carolina. The accident vehicle was registered in Michigan and rented in Florida for a one-way trip to South Carolina. In predicting that New York had no interest in applying its

vicarious liability statute to a vehicle having no connection to New York, the Court stated:

> So far as it appears, the vehicle had never been to New York State and there is no indication that its owner had any intention that it be driven into that state.

Id. at 1182.

In 1992, in *Fried*, New York's highest court gave statutory construction to the "used or operated in this state" portion of VTL 388. The guesswork required of the Fourth Circuit in *Klippel* was thus removed. *Fried* held that the vicarious liability imposed by the statute does not extend to owners of vehicles that have never been registered, used, operated *or* intended for use within this state. *Id.* at 654 (emphasis added).

Herein the renting of the vehicle for the sole purpose of traveling to New York and the use and operation of the vehicle in New York, from February 12, 2002 through February 15, 2002 brought the vehicle squarely within the substantive coverage of VTL 388. The accident vehicle was used, operated *and* intended for use in New York. The record in *Klippel* establishes that vehicle was not registered, used, operated or intended for use in New York. Its facts fall squarely outside the substantive coverage of VTL 388.

Petitioner simply attempts to conjure up a conflict between the circuits where none exists. *Fried* removed all necessity of predicting the statutory construction of the term "used or operated in this state" in VTL 388. Presented today with the issue of the substantive coverage of VTL 388, both

circuits would simply perform a *Fried* analysis. Applying *Fried*, a *Klippell* fact pattern falls outside the substantive coverage of VTL 388, while a Budget fact pattern falls squarely within the substantive coverage. The purported conflict is purely imaginary.

II. NO CONFLICT EXISTS BETWEEN THE THIRD CIRCUIT AND NEW YORK'S COURT OF APPEALS

Petitioner further argues that a conflict exists between the Third Circuit and *Fried*. Its argument is based on its complete misunderstanding of the holding of *Fried*. Petitioner fallaciously argues that *Fried* limits the extraterritorial application of VTL 388 to vehicles registered in New York. (Pet. 8). From that flows its spurious argument that a conflict exists between the Third Circuit and New York's Court of Appeals.

The Lower Court properly interpreted and applied *Fried*. The Court correctly noted that *Fried* drew the line at vehicles registered, used, operated or intended for use within the state (Pet. App. 13a). The Court found Budget's vehicle to be used, operated and intended for use in New York. (Pet. App. 13a).

As stated by the Lower Court, the *Fried* court noted that "'the holding in *Farber* ha[d] little bearing on the statutory construction problem presented [in *Fried*], since, *by virtue of its prior 'use . . . or operat[ion] in [New York],' the accident vehicle in Farber was indisputably within section 388's substantive coverage . . .' Fried*, 587 N.Y.S.2d 247, 599 N.E.2d at 654 (emphasis added)." (Pet. App. 12a-13a).

The petitioner seeks to fabricate a conflict by arguing that the Third Circuit misconstrued *Farber v. Smolack*, 229 N.E.2d 36, 20 N.Y.2d 198 (1967). Petitioner argues that it was the registration of the vehicle in New York that brought the *Farber* vehicle within the substantive coverage of the statute. While the *Farber* vehicle may have been registered in New York, *Fried*'s focus on *Farber* was not on registration, but rather on the prior use of the vehicle in New York that brought the vehicle within the substantive coverage of VTL 388.

Notwithstanding that *Fried* could not be any more clear on its face, the Third Circuit also properly relied on New York's intermediate appellate court's decision in *Vasquez*, which applied VTL 388 to facts involving a Pennsylvania accident and registration, where the vehicle had previously been used and operated in New York. *Vasquez* was decided five months after *Fried* and cites *Fried* as authority for the application of VTL 388. The Third Circuit correctly interpreted and applied New York law. Petitioner attempts to manufacture disarray where none exists.

III. NEW YORK LAW MAY BE APPLIED IN A CONSTITUTIONALLY PERMISSIBLE MANNER

When a vehicle falls within the substantive coverage of VTL 388 that statute may only be chosen in a choice-of-law analysis if it may be applied in a constitutionally permissible manner. The Third Circuit correctly applied this Court's precedent and concluded that VTL 388 may be chosen in a constitutionally permissible manner.

Petitioner fairly cites *Hague* as the relevant precedent of this Court to determine whether the substantive law of a